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Saturday, June 02, 2007

Why Justices can be rude

Live from my *alma mater*, Professor Orin Kerr asks why U.S. Supreme Court Justice Ruth Bader Ginsburg has recently taken the gloves off in her dissenting opinions. They are getting less "collegial" and more blunt.

Ginsburg is following in the grand tradition not only of Justice Harry Blackmun (who, as Kerr points out, sharpened his rhetoric and made fairly direct appeals for political attention just before he retired) but of Justice Antonin Scalia. Scalia's (in)famously ascerbic dissents have long been an object of interest among legal commentators, who have wondered how such rhetoric can do anything but further antagonize his fellow Justices, whom he presumably would rather influence towards his point of view.

The answer is that he had a different audience in mind. His purpose was probably not, as Kerr suggests for Blackmun, to influence elections themselves -- voters don't read Supreme Court opinions. Scalia's dissents instead played a big role in drawing the attention of conservative insiders to the Court. They motivated conservative pundits to pay attention to the Court, and conservative pundits got conservative media generally paying attention. They had the authority of a Justice to back their claims that there were big problems with the Court. Scalia's dissents have provided a blueprint for what legal doctrines conservatives should support, and which need fixing, a blueprint which cannot be obtained either from typical conservative punditry about abortion etc. or from the liberal legal academia. Many talented conservatives became involved in finding and promoting high quality judges with the proper Scaliaist beliefs, like now Chief Justice John Roberts. Highly motivated conservative attention is why talk radio, to the bewilderment of all except conservatives, buried Harriet Myers for insufficient conservative purity. Instead of two more Justice David Souters -- a seemingly conservative Republican pick who infamously ended up turning out quite liberal opinions -- conservatives as a result have two more solid seats "in the mold of Scalia and Thomas" -- really far more in the mold of the former -- on the Court with Roberts and Justice Samuel Alito.

I give Scalia's sharp dissents much of the credit/blame for that. An effective ideologue does not pull punches. Ginsburg and Justice John Paul Stevens would be politically wise to folllow Scalia's strategy of direct talk if they wish to influence future Court choices. They have the best tenure anybody could hope for and they should directly speak their minds. As for its overall effect, bluntness may make the Court seem less civilized -- hurting its authority in the same way that taking off its robes and dressing in jeans would hurt its authority -- but it increases the amount and diversity of truth that it speaks. That is a quite welcome thing in these parts.

Posted by Nick Szabo at 4:18 PM

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Nick Szabo

"A premier thinker about history, law and economics, and the lessons they have for security." -- Adam Shostack, Emergent Chaos

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